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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

H. HIGHFILL and VALLEY CREDIT COMPANY, a Corporation,
Petitioners,
vs.
LULU J. DILATUSH,
Respondent.

No. 877

## BRIEF

**In Opposition to the Issuance of Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.**

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1.

### THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (Tr. 47) is reported as Dilatush v. Highfill et al., 140 F. (2d) 741.

2.

### JURISDICTION.

Respondent does not dispute the jurisdiction of this Court to hear the petition herein presented, but does contend, as will be brought out in her argument, that this is such a case that this Court, within its discretion, should

not assume jurisdiction and issue said writ of certiorari, as provided by Section 240 of the Judicial Code, 28 U. S. C. A., Sec. 347 (a), and Section 262 of the Judicial Code, 28 U. S. C. A. 377, and as held by this Court in the following cases, to wit:

Indianapolis v. Chase National Bank, 314 U. S. 63, 86 L. Ed. 47;
Wheeler v. City and County of Denver, 33 S. Ct. 842, 229 U. S. 342, 57 L. Ed. 1219.

3.

## STATEMENT OF THE CASE.

Respondent cannot accept petitioners' statement of the case as it almost wholly omits such matters that are unfavorable to petitioners and favorable to this respondent. Respondent adopts, and asks that it be considered as her statement of the case, the statement made by the United States Circuit Court of Appeals for the Eighth Circuit, made by Woodrough, Circuit Judge, who delivered the opinion of the Court (Tr. 48-53).

4.

## ARGUMENT.

A.

**The decision of the Circuit Court of Appeals is not in conflict with the applicable decisions of the Supreme Court.**

1. **In holding that "As each and all of them have failed and refused to pay, it is manifest that controversy exists between her and each of them, and it is immaterial whether the controversy arises from defendants' denial of liability or from their unwillingness to pay or from their inability to do so, or from all causes"** (Tr. 53).

In Indianapolis v. Chase National Bank, 314 U. S. 63, 86 L. Ed. 47, this Court, in discussing the same question, among other things, states as follows:

> "As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record. Though variously expressed in the decisions, the governing principles are clear."

The United States Circuit Court of Appeals, in making the above statement objected to by petitioners, fully realized this primary fact in making that statement and in reaching their decision, i. e., each case must be decided upon its own facts. In this instant case all respondent Lulu J. Dilatush seeks and desires is to obtain a money judgment for the $23,000.00 (plus interest), which she originally loaned to her son. She wants her money back. Who owes to her the money, and how much, is the only controversy. She says that they all owe her. The defendants, as is often the case, point the finger of liability at each other. But, as the Circuit Court of Appeals said, since each and all of them have failed and refused to pay her, it is manifest that controversy exists between her and each of them. In Indianapolis v. Chase National Bank, supra, a much differ-

ent situation exists. There the judgment for debt was merely incidental. The real controversy was the validity of the lease in question, and it was because of that fact that the Court therein held as they did.

The facts are not comparable, and the decisions, therefore, are not in conflict.

2. **The Circuit Court of Appeals did not err in holding as contrary to the evidence the finding of the trial court that there was no collision or conflict of interest between the plaintiff (respondent) and her son** (Tr. 54).

Again this does not conflict with the holding in the Chase case, supra, as the facts are not comparable.

In the Chase case, Indianapolis Gas said in effect to Chase, "Yes, I owe you, but I can't pay you because I have leased my properties to Citizens Gas and the City. If the lease is valid they will have to pay me and then I can pay you, and I would like to see that happen, as my stockholders will profit also."

In this case R. E. Dilatush says to his mother, this respondent, in effect as follows: "Yes, I borrowed this money from you, and you have not been paid. My co-defendants, who were attempting to defeat my other creditors for their own benefit, told me to obtain the notes for them and they would assume the payment of them. Now, they owe you the money also. They are jointly obligated with me. They told me they would pay you and I conveyed their message to you. They actually received the benefit of your security as a result of the deal. Now, all I want is to see the obligation, which is a just one, paid, and that they pay it as agreed. I do not now owe you the money solely by myself, and I do not want you to get a money judgment against me alone, although I do want you to recover what is rightfully and justly yours."

3. **The Circuit Court of Appeals did not err in holding that a suit "by one who charges refusal by another to pay a debt claimed to be due from him presents the conflict of interest that constitutes a controversy between the party plaintiff and the party defendant under the statute. 28 U. S. C. A. 41, Par. 1"** (Tr. 54).

This statement is not contrary to the law as announced in the Chase Case, supra, for the reason that the facts are different. In the Chase case the debt sued on was merely incidental, the real question in dispute being the validity of the lease. Here the only question involved was the refusal of the three defendants to pay a debt which plaintiff (respondent) claims to be due to her. She has no other axe to grind that would benefit any of the defendants. Whether, of course, she can sustain her action against all of the defendants is a matter to be decided in a trial on the merits, and not in this proceedings, as the petitioners apparently are attempting to do.

4. **The decision of the Circuit Court of Appeals is not in conflict with applicable decisions of the Court in holding that R. E. Dilatush "has no interest on the plaintiff's side in the lawsuit his mother has brought against him and others to justify realigning him on her side as a party plaintiff."**

This is a simple suit for money obtained through fraud. The partnership mentioned by petitioners in their brief is not involved therein, as petitioners themselves admit (Tr. 37, bottom of page) that the agreement was not binding, but was made as protection against other creditors of R. E. Dilatush. The Circuit Court of Appeals, in making the above statement, is talking of legal interests. As stated by them (Tr. 55), "It is undoubtedly true that the son's filial feelings incline him to sympathize with his mother in

her loss and to hope for its restoration." That is a very fair and complete statement of his interest on his mother's side in this lawsuit. This is a quite different kind of interest from that which this Court found to be present in Indianapolis v. Chase National Bank, supra.

B.

**The Circuit Court of Appeals has not so far departed from accepted procedure in an important matter affecting procedure generally throughout the country, as to call for the exercise of the power of supervision by the Supreme Court.**

The Circuit Court of Appeals has expressly applied the facts in this case to the law as set forth by this Court in the case of Indianapolis v. Chase National Bank, supra (Tr. 55), and after applying said law found no basis for realignment. Their holding is the accepted procedure in cases where like facts exist.

Detroit Tile & Mosaic Co. v. Mason Contractors Ass'n, 48 F. (2d) 729;
Republic National Bank & Trust Co. v. Massachusetts Bonding & Ins. Co., 68 F. (2d) 445;
Staten v. Louisville Trust Co., 28 F. Supp. 301;
Stephens v. Ohio State Telephone Co., 240 F. 759;
Wheeler v. City and County of Denver, 33 S. Ct. 842, 229 U. S. 342, 57 L. Ed. 1219.

We think the Circuit Court of Appeals has applied the facts of the case fairly to the rule as laid down in the Chase Case, supra, and that the Federal Court in Arkansas had jurisdiction of this case, as by them held.

Petitioners state that the question of jurisdiction is always a primary one in federal procedure. The federal courts are also interested in seeing that justice is done.

The facts in this case show (Tr. 25) that this suit was originally brought in the Circuit Court of Mississippi County, Missouri, where certain notes given to secure the sale of the land in question in this suit were attached. That the notes were assigned and the suit was dismissed for lack of jurisdiction. That suit was then brought in the Circuit Court of Dunklin County, Missouri, which was the legal residence of defendant, Valley Credit Company. That said company did not have an officer, agent, or office in said county, or in the State of Missouri, as required by law; that service could not be obtained and the suit had to be dismissed. That suit was then brought in the District Court of the United States, Eastern District of Arkansas, Jonesboro Division, and service obtained on all defendants. Since that time all efforts of defendants, petitioners herein, have been made for the purpose of delay, and not for trial of the suit. Had suit been filed in the state courts of Arkansas, past conduct on the part of petitioners herein would lead this respondent to believe that petitioners' first act would have been the filing of a petition for removal to the federal court, which we think, according to law, would have had to have been sustained.

This respondent does not believe that the Honorable Circuit Court of Appeals has committed error. That this case has been fairly tried, and that it is not necessary or desirable from the standpoint of justice and the stabilizing of federal procedure that this writ of certiorari should issue and this case be given further review by this Court.

That justice would be more satisfactorily and equitably served if this respondent be given an early opportunity for a trial upon the merits in this cause.

Respondent therefore respectfully submits and prays that this writ of certiorari be denied.

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